Supreme Court, U.S.
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No. 99-1368

IN THE

Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

SOUTHWESTERN BELL VIDEO SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. MCKETTA, III
Counsel of Record
MICHAEL DIEHL
EDWARD STEVENS MCHORSE
GRAVES, DOUGHERTY, HEARON
& MOODY, P.C.
Attorneys for Respondent
515 Congress, Suite 2300
Austin, Texas 78701
(512) 480-5600

158481

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Parties:

Appellant below: The City of Austin, Texas

Appellee below: Southwestern Bell Video Services, Inc.

Rule 29.6 Statement:

Southwestern Bell Video Services, Inc., is a wholly owned subsidiary of SBC Communications Inc., a company whose stock is publicly traded.

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PRELIMINARY STATEMENT

The City of Austin (the "City") asks this Court to review a fact-bound District Court decision against the City on only one of the two alternative grounds relied upon by the District Court, and in the absence of any actual conflict among the circuits.

The District Court held that a video programming provider using a common carrier's transport services to transmit signals across a city does not thereby "use" the municipal rights-of-way for regulatory purposes under the Cable Communications Policy Act of 1984, as amended, 47 U.S.C. §§ 521-573. City's App. 27 and 32 (ruling); *id.* 21-27 (reasoning). The District Court also held, separately, that the particular relationship of the common carrier and video programming provider shown by the facts in this case did not make the video provider a "cable operator" who was obligated to obtain a municipal franchise. *Id.* 28-32.

The Fifth Circuit affirmed on the second ground, without reaching or disagreeing with the District Court's first ground. Both bases for the District Court's judgment are consistent with a contemporaneous decision by the Federal Communications Commission, on similar but not identical facts, that was subsequently affirmed by the Seventh Circuit.

The City asserts that these two Court of Appeals decisions and a third, similarly fact-specific decision from the Eighth Circuit produce, in the City's view, an "unsettled" (City's Petition 7), "clouded" (*id.* 12), "muddled" (*id.* 13) or "[u]ncertain" rule of law (*id.* 16), but the City does *not* claim that these decisions reflect an actual inter-circuit conflict.

There is no conflict among the circuits; the Fifth Circuit applied the statute correctly on the facts presented in the record; and, in any event, either of the alternative grounds relied upon by the District Court supports the judgment. Under these circumstances, Respondent respectfully urges this Honorable Court to deny the City's petition for writ of certiorari.

COUNTER-STATEMENT OF THE CASE

A. Factual Background

Southwestern Bell Video Services, Inc. ("SBVS") initially offered television programming delivery services to customers within the City by placing satellite and broadcast antennae at individual apartment complexes and delivering programming received by those antennae to the residents.

Thereafter, in December 1996, the Federal Communications Commission ("FCC") approved a new telecommunications service tariff for Southwestern Bell Telephone Company ("Bell Telephone"), a company that provides telephone and telecommunications services throughout the City and in other areas. District Court Order on Motion for Summary Judgment ("Order"), City's App. 15. Although SBVS and Bell Telephone are both wholly-owned first-tier subsidiaries of a common corporate parent (SBC Communications Inc.), they do not have any shared or common directors, officers, or employees. *Id.* 14.[1]

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1. In this Response, citations to "App." in every instance refer to the Appendix to the Petition filed by the City of Austin.

Bell Telephone is a certificated telecommunications carrier under Texas law and a "common carrier" for purposes of Titles I and II of the Communications Act of 1934, 47 U.S.C. §§ 151-276. At all relevant times, Bell Telephone operated under a telecommunications franchise agreement with the City, premised on its placement and use of communications facilities within the City's rights-of-way. Order, App. 14. Under that franchise, Bell Telephone pays the City fees for lines in the City that are used to provide any telecommunications services within the scope of Title II of the Communications Act of 1934. *Austin Ordinance No. 970213-E* (Ordinance, Feb. 13, 1997) § 18-8-3(11) and (12) and § 18-8-11 (Stipulations filed in District Court ("Stips.") Exh. 1); *Austin Ordinance No. 970213-K* (franchise consent for Bell Telephone, Apr. 3, 1997) Part 3(A) and (B) (Stips. Exh. 2).

Bell Telephone's 1996 tariff FCC No. 73 included provisions for a signal transport service called "Supertrunking Video Service" ("Supertrunking"), under which any potential customer could obtain transport of video signals through Bell Telephone's telecommunications facilities for a tariffed price. Stips. Exh. 4 (Tariff No. 73); Order, App. 15-16. Under that tariff, the customer specifies where it will turn over its traffic to the common carrier and the locations where delivery is needed, but the customer "does not specify what transmission facilities or . . . route [the common carrier] will use to provide service." *Id.* 16. Bell Telephone transports the customer's signals "using only [its own equipment], over routes of its own choosing" to the specified delivery address. *Id.* 17.[2]

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2. "In fact," the District Court noted, "once [SBVS'] transmissions pass into [Bell Telephone's] facilities, [SBVS] has (Cont'd)

After this service became available, SBVS altered the manner in which it operated, contracting with Bell Telephone for the build-out and use of space in a single location at one of the latter's central offices where SBVS could locate its signal-reception equipment and deliver its traffic to Bell Telephone. *Id.* 16. SBVS also purchased service under the Supertrunking tariff to have Bell Telephone deliver SBVS' signal traffic to demarcation points at specified apartment complexes, where SBVS' own equipment received the traffic, reconfigured it, and delivered programming to SBVS' subscribers. *Id.* 15 and 17.

B. Proceedings in the District Court

Contending that a municipal franchise was required for SBVS' operations, the City sued SBVS, but not Bell Telephone or SBC Communications Inc. The parties prepared stipulations consisting of both factual statements and documents, and filed cross-motions for summary judgment.

(Cont'd)
no control, management, or responsibility over the manner in which [Bell Telephone] provides its supertrunking video service." *Id.* 31. The City thus misstates the relationship of the common carrier and its customer using Supertrunking by alleging that the service involves "*routes . . . leased* to Bell Video." City's Petition 3 (emphasis added). As the District Court made clear (and as the City stipulated below, *see* Stips. No. 15), a Supertrunking customer has no control at all over what routes the common carrier elects to use. SBVS also disagrees with comments in the City's "Statement of the Case" that do not simply state the unadorned relevant facts but are, instead, argumentative in nature and completely without any record support, such as the assertions that SBVS and Bell Telephone "teamed up to provide a new cable service in Austin" (*id.* 2) or that there was any sort of "cable service arrangement between [SBVS] and Bell Telephone" (*id.*). *See* Supreme Court Rule 15.2.

While these motions were pending, the FCC issued a ruling involving the same core legal issue: whether a programming provider had to obtain a municipal franchise under 47 U.S.C. § 541(b) [Cable Act § 621(b)] if the provider used a common carrier's Supertrunking service to send its video signals across a city, but had no facilities of its own in any city right-of-way. *In the Matter of Entertainment Connections, Inc.*, FCC 98-111, 13 FCC Rcd. 14277 (1998) ("*In re ECI*").[3]

The FCC ruled that no municipal franchise was required, on two distinct grounds. The FCC concluded, first, that the facilities of the common carrier (Ameritech) and of ECI "do not constitute a single, integrated cable system"[4] and, therefore, ECI "is not a cable operator[5]. . . because it does not provide service to its subscribers through a cable system." *In re ECI* ¶ 61. Second, the FCC examined the question of whether a video provider was "using" city rights-of-way for franchise requirement purposes if its presence in city streets consisted merely of its signals transported in a common carrier's lines. The FCC concluded, "We also find that ECI qualifies for the private cable exemption . . . which provides that 'a facility that serves subscribers without using any

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3. The FCC's *In re ECI* decision refers to sections of the Cable Communications Policy Act of 1984 (the "Cable Act"), rather than to the codification cited by the City, District Court and Fifth Circuit. For ease of reference, this response provides parallel citations.

4. The term "cable system" is defined, and exceptions to that definition are set out, in Cable Act § 602(7), 47 U.S.C. § 522(7).

5. The term "cable operator" is defined in Cable Act § 602(5), 47 U.S.C. § 522(5).

public rights of way' does not constitute a cable system . . . ." *In re ECI* ¶ 62.[6]

SBVS' pending motion for summary judgment contended that the delivery of its video signals to a common carrier for transport, where only the common carrier's facilities were located in City rights-of-way, fell within this statutory "without using" exception. The District Court agreed. Order, App. 27 and 32 (ruling); *id.* 21-27 (reasoning). In addition to concluding that there was no "cable system" subject to franchise requirements, the District Court also ruled that the affiliate relationship between SBVS and Bell Telephone did not make SBVS a "cable operator." *Id.* 28-32.[7]

The District Court's Order did not discuss the second statutory exception that SBVS claimed in its pleadings — the exemption from the "cable system" definition applicable to "a facility of a common carrier . . . subject to the provisions of Title II of [the Communications] Act." 47 U.S.C. § 522(7)(C); Cable Act § 602(7)(C).

C. Proceedings at the Fifth Circuit

After the City appealed, and after briefs were filed in the Fifth Circuit, SBVS ceased using Supertrunking in the

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6. The "without using" exception to the "cable system" definition is set out in Cable Act § 602(7)(B), 47 U.S.C. § 522(7)(B).

7. The franchise requirement applies only to a "cable operator." 47 U.S.C. § 541(b). The "cable operator" definition (*id.* § 522(5)), in turn, applies only to a "cable system," defined in 47 U.S.C. § 522(7). SBVS' motion contended that the primary dispositive question was whether its activities fit within the statutory definition of a "cable system" (taking the statutory exceptions of 47 U.S.C. § 522(7)(B) and (C) into consideration).

City. Instead, SBVS located antennae at each apartment complex. SBVS accordingly moved to dismiss as moot the City's appeal insofar as the City had appealed the denial of injunctive relief. The Fifth Circuit carried this motion with the case and denied it as moot when it affirmed the District Court. App. 7 n.10.

In the appeal, the City contended that the statutory "cable operator" definition applied because SBVS and Bell Telephone were affiliates. SBVS' arguments focused primarily on the statutory "cable service" definition and two exceptions to that definition — the "without using" provision and the "facility of a common carrier" provision. SBVS pointed out that the "cable operator" definition applied only where there was a "cable system," and that the absence of a cable system precluded treating SBVS as a "cable operator" (*see* App. 10 n.5).[8]

In deciding the case, the Fifth Circuit accepted, "for the sake of discussion," the City's contention that the SBVS equipment and its use of Supertrunking constituted a "cable system." App. 4 n.7. The Court then focused on the City's contention that the common ownership of SBVS and Bell Telephone caused SBVS' use of Supertrunking to come within the "cable operator" definition — 47 U.S.C. § 522(5). App. 4-6. On the undisputed facts noted by the District Court (and as stipulated by the City), the Court concluded that SBVS did not own a "significant interest" in a cable system and that it did not "control[ ]" such a system. *Id.* 5-6.

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8. SBVS' discussion of the "cable operator" definition in its Fifth Circuit Brief focused on the contentions that the City's " 'common ownership' theory" (Brief of Appellee 30) and " 'integrated system' argument" (*id.* 35) disregarded, required modifying, or nullified other provisions of the Cable Act. *Id.* 30-35.

The Fifth Circuit did not address the "without using" exception to the cable system definition, which was the alternative basis for the District Court's judgment.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT DECISION PRESENTS NO QUESTION WORTHY OF CERTIORARI UNDER SUPREME COURT RULE 10.

Although Rule 10(a) speaks of "a decision in conflict with the decision of another court of appeals," the City does not, in fact, contend that any actual conflict exists between the Fifth Circuit's decision and that of any other court of appeals. Instead, the City asserts that there is, at most, a lack of perfect clarity in or parallelism among three decisions. But even this claim is exaggerated, as each decision reflects the application of the Cable Act's provisions to a distinct factual situation.

A. The Seventh Circuit's *City of Chicago* decision

The City concedes that *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), presented facts that are "similar, but not identical" to those of this case (City's Petition 13). In that case, a video programming provider, ECI, similarly used services purchased under the Supertrunking tariff of a common carrier, Ameritech, to handle the transport of video signals from a headend through a city's rights-of-way to apartment complexes. The central factual difference was that ECI was not an affiliate of the common carrier.

The Court had before it the FCC's decision ruling that ECI was not required to obtain a franchise for two distinct reasons. First, the FCC had held that "ECI's facilities and Amertech's facilities do not constitute a single, integrated cable system" and, thus, the "cable operator" definition in 47 U.S.C. § 522(5) did not apply to ECI. *In re ECI* ¶ 61. Second, the FCC had ruled that ECI's delivery of signals to a telecommunications common carrier for it to transport through rights-of-way on the common carrier's own facilities fell within the "without using" exception of 47 U.S.C. § 522(7)(B), so that there was in any event no "cable system" subject to municipal franchise requirements. *In re ECI* ¶¶ 62-63.

The Seventh Circuit affirmed *each* aspect of the FCC's decision. *City of Chicago*, 199 F.3d at 431-32 (affirming the decision that ECI was not a "cable operator"); *id.* at 432-33 ("[i]n addition," affirming that ECI was providing service "without using" city rights-of-way). Although the first ruling treated the lack of affiliation between ECI and Ameritech and their "separate ownership and control" of their own facilities as a relevant factor (*id.* at 432), the Court's analysis of the "without using" basis for the FCC's decision was premised on the recognition that it was Ameritech, not ECI, that had facilities located in municipal rights-of-way (*id.* at 432-33).

The interpretation of the "without using" provision of the Cable Act in *City of Chicago* is substantively identical to the alternate ground on which the District Court granted SBVS summary judgment in this case. The City's Petition is silent about this. Instead, the City focuses only on differences between the analytical approaches the Seventh Circuit and Fifth Circuit applied to the statute's "cable

operator" definition. Describing the Seventh Circuit's reasoning as "indefinite" and "multi-factored," the City asserts that the *Seventh Circuit's* decision (*not* the Fifth Circuit's) "leaves the application of the 'cable operator' definition in an uncertain state" (Petition at 13). In contrast, the City characterizes the Fifth Circuit's ruling as "rigid[ ]" (*id.* at 14) and, thus, apparently completely clear.

The City's contentions miss the main point: Both courts ruled that a video programming provider using common carrier transport was not a "cable operator" who was required to obtain a municipal franchise. Subtle differences between the paths to that key ruling taken by the two courts do not create a conflict. Moreover, the Seventh Circuit's construction of the "cable system" definition echoes the alternate ground for the District Court's decision in this case, and the City concedes that it is "unknown" what the Seventh Circuit would have decided if an affiliate of Ameritech, instead of ECI, had used Supertrunking in the same manner as ECI and SBVS (City's Petition 15).

There is clearly no conflict between the decisions of the Fifth Circuit and Seventh Circuit.

B. The Eighth Circuit's *City of Ames* decision

The second decision cited by the City is *City of Ames v. Heritage Communications*, 861 F.2d 185 (8th Cir. 1988). Petition at 15-16.

The facts pertinent to the construction of the "cable operator" definition in that case were, however, materially different from those in this case or in *City of Chicago.*

City of Ames involved a parent company — Heritage Communications, Inc. ("Heritage") — and two of its subsidiaries, Ames Cablevision (a cable provider with a franchise to provide cable service in Ames, Iowa) and a new subsidiary that Heritage created to serve students within the city at Iowa State University (the "ISU Subsidiary"). 861 F.2d at 186.

Heritage initially negotiated with the city over the facilities Ames Cablevision would need in city rights-of-way, co-signed for rental of space on city power poles, declared that it was responsible for Ames Cablevision's obligations, funded an election to obtain approval of the subsidiary's franchise, negotiated changes in cable regulations with the city, and accepted the franchise after it was granted. *Id.* at 187. On these facts, the magistrate before whom the case was tried "found that throughout Ames Cablevision's solicitation and use of the franchise, Heritage acted on Ames Cablevision's behalf and Heritage acted as if the franchise belonged to itself, the parent." *Id.* at 186.

Subsequently, Heritage created and then acted as the agent for its new ISU Subsidiary, negotiating an agreement with the university allowing the ISU Subsidiary to provide cable service to student residence halls. *Id.* at 187. The ISU Subsidiary then went into business, sharing headend office space with Ames Cablevision and using Ames Cablevision's facilities to transport video traffic through city rights-of-way to the university dormitories. *Id.* at 187-88. Finally, "*Heritage* proceeded to inform the City that it would not pay franchise fees for [the ISU Subsidiary's] service." *Id.* at 188 (emphasis added).

The city sued the two subsidiaries *and* their parent, Heritage, contending that the city was entitled to assess franchise fees on the service of the ISU Subsidiary. *Id.* at 186.

Under these facts, "[t]he magistrate decided that [Heritage and its two subsidiaries] were operating a single cable system within the meaning of the [Cable] Act," and the District Court held that the city could collect franchise fees. *Id.* at 187. The Eighth Circuit affirmed, stating "we cannot say the magistrate's decision was clearly erroneous." *Id.* at 188.

The City's truncated presentation of *City of Ames* points out only that "[t]he franchised and unfranchised cable providers were affiliates of one another [as] subsidiaries of the same parent company." Petition at 16. Little else about *City of Ames* resembles the facts of this case, however.

The differences between these cases are both manifold and material.

The transport facilities operated by the Heritage companies functioned as a completely closed transmission path. Neither Heritage nor either of its subsidiaries was a common carrier obliged to offer signal transport service to any customer. In contrast, SBVS obtained from Bell Telephone only the same services, at the same prices, that any other similarly situated customer could obtain. In addition, cable franchise fees represented the *only* source of city revenue for the use of municipal rights-of-way by Heritage's ISU Subsidiary, while the City of Austin separately assesses fees on Bell Telephone's Title II telecommunications facilities in the City, whether they are used to transmit voice, data or other forms of traffic.

Further, there was no evidence in this record showing the sort of alter ego relationship that existed among the Heritage companies, or suggesting that SBVS' parent corporation ever acted on behalf of SBVS or Bell Telephone in their dealings with the City. Instead, as the Fifth Circuit noted, the evidence before the District Court, to which the City stipulated, delineated clear boundaries between SBVS and Bell Telephone. App. 6; *see also* App. 14-17 (District Court Order).[9]

In sum, *City of Ames* represents a decision driven by the particular interrelationships of the three Heritage companies. Nothing about it conflicts with the decisions of other courts evaluating materially different facts.

C. These decisions do not present any conflict

In its discussion of *City of Ames*, the City recognizes that "the [Eighth Circuit] reviewed the factual details of the activities and relationships of the parent company and its subsidiaries." Petition at 16. Given the provision at issue in that case — the "cable operator" definition on which the City itself relied in this case — an inquiry into the precise relationship of the video programming provider and the signal transport provider is appropriate. The Eighth, Seventh and Fifth Circuit decisions all embody such an inquiry, and each decision reflects the particular facts of the particular case before each court.

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9. The City of Austin elected to present a case based on the theory that common ownership necessarily meant that a video provider subsidiary was a "cable operator." The City did not bring suit against Bell Telephone or SBC Communications Inc. Further, although the City was free to develop any factual record it deemed necessary for its case, it submitted the case for decision with these parties and on this record.

These decisions do not present a conflict. Instead, they present fact-based decisions that differ because the facts of each case were different. Fact-bound disputes of this sort do not merit Supreme Court review.

D. A ruling on the atypical facts presented by this case would have only limited precedential importance

The City's Petition challenges a service arrangement and a relationship of service providers that is not presented by any other case and, indeed, that is in fact no longer in existence even with respect to SBVS at present. The sole lingering dispute the City asks this Court to resolve, over a relatively minuscule amount of franchise fees, does not create a certworthy case. Furthermore, the Petition offers, at best, only speculations that this issue might arise again in the future and that a decision by the Supreme Court might have prospective importance.

In the absence of any genuine conflict and of any pressing need, residual concerns about affiliation and ownership issues arising under the "cable operator" definition in 47 U.S.C. § 522(5) can be addressed by the FCC — an administrative remedy shown to be available by *In re ECI* — and by allowing the issue to be considered among the circuits, if it arises again. Indeed, the City notes that parties to the *City of Chicago* decision have requested further review by the Seventh Circuit. Petition 13 n.4.

For all of these reasons, this case is not one that merits review by this Court through a writ of certiorari.

II.

THE FIFTH CIRCUIT'S JUDGMENT SHOULD NOT BE REVIEWED BECAUSE IT IS ENTIRELY CORRECT.

The Cable Act defines a "cable operator" as

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. § 522(5).

The Fifth Circuit examined the facts and ruled that, even if the Bell Telephone facilities and all of the SBVS equipment were considered collectively to be a "cable system," SBVS' satellite dishes, tower, antennae and headend did not constitute the requisite "significant interest" in the aggregated facilities and did not place SBVS in the role of controlling a cable system. App. 5.

On a record showing that SBVS neither owned nor controlled the facilities that were provided by Bell Telephone, this was a straightforward reading of the statute. Moreover, the Fifth Circuit's analysis and decision stands squarely between the decisions of the Seventh Circuit and Eighth Circuit. The *City of Chicago* decision concludes that no cable operator (or cable system) exists on parallel facts where there is no affiliate relationship between the video provider and transport provider. At the other end of the

spectrum, the *City of Ames* decision held that a corporation, there Heritage, could not evade franchise requirements by operating through alter ego subsidiaries in a way that created only a sham division of ownership and control over facilities that clearly used city rights-of-way and that were not open, common carrier systems. The Fifth Circuit addressed a factual situation between those two extremes, and defined another point on the factual continuum where a particular ownership and control relationship does not trigger the cable operator definition.

Furthermore, although the City quarrels with the reasoning and conclusion of the Fifth Circuit majority, the City completely ignores the alternative ground for the District Court's ruling in favor of SBVS — the private cable exception excluding from the definition of "cable system" a service that is provided "without using any public right-of-way." 47 U.S.C. § 522(7)(B). As the District Court pointed out, the FCC's reasonable construction of a statute it is charged with enforcing merits due deference (Order, App. 22-23), and the FCC's *In re ECI* decision concluded that this exception applied to an analogous service arrangement (Order, App. 23-26). The Fifth Circuit did not reach this issue, but neither the majority opinion nor the dissenting opinion questioned this ruling.

The City thus seeks review where the judgment below is correct and where, in any event, a ruling on the "affiliation" and "ownership" issues that are now raised by the City would not change the alternative basis for judgment in favor of SBVS and against the City. Indeed, the City not only has failed to challenge this alternative basis for the District Court's judgment, it has not raised *any* question related to that ruling in its Petition.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

JOHN J. MCKETTA, III
Counsel of Record
MICHAEL DIEHL
EDWARD STEVENS MCHORSE
GRAVES, DOUGHERTY, HEARON
& MOODY, P.C.
Attorneys for Respondent
515 Congress, Suite 2300
Austin, Texas 78701
(512) 480-5600